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No. 1317

In the

Supreme Court of the United States

OCTOBER TERM, 1967

MAX B. GOLDBLATT,
Appellant,

v.

THE CITY OF DALLAS,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

MOTION TO DISMISS AND IN THE ALTERNATIVE TO AFFIRM

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2-3
Statutes Involved	3
Statement of the Case	3-4
Argument	5-10
I. Jurisdiction	5-6
II. Unsubstantial Question	6-10
Conclusion	10
Certificate of Service	11

Page

Avery v. Midland County, Texas, (36 LW 4257, April 1, 1968) 6, 7, 8

Double Eagle Lubricants, Inc. v. Texas, 248 F. Supp. 515 (1965), 384 U.S. 434 (Dism. Lack of Jurisdiction); 385 U.S. 890 (Reh. Denied) 5

Dusch v. Davis, 387 U.S. 112 (1967) 5, 6, 7

Fortson v. Dorsey 379 U.S. 433 (1965) 7, 9, 10

Goldblatt v. City of Dallas, 279 F. Supp. 106 ..... 2, 6

Moody v. Flowers, 387 U.S. 97 (1967) 5

Phillips v. United States, 312 U.S. 246 (1941) 5

Reed v. Mann, 237 F. Supp. 22 (N.D. Ga. 1964) 9

Reynolds v. Sims, 377 U.S. 533 (1964) 6, 8

Wesberry v. Sanders, 376 U.S. 1, (1964) 9

Other Authorities

Constitution of the United States
Fourteenth Amendment
Equal Protection Clause 3, 6

United States Code
28 USC § 1252 2

28 USC § 1253 2

28 USC § 2281 ..... 2, 5

Charter of the City of Dallas
Section 21, Chapter IV 2, 3, 5

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MOTION TO DISMISS AND IN THE ALTERNATIVE TO AFFIRM

To the Honorable Supreme Court of the United States:

Appellee in the above-entitled case moves to dismiss and in the alternative to affirm on the grounds that this Court does not have jurisdiction of the appeal, and that the questions presented are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, acting both in a three-judge and single-judge capacity, is reported at 279 F. Supp. 106 (1967) and is attached as Appendix "A" to the Jurisdictional Statement of the Appellant herein.

JURISDICTION

This action was brought by the Appellant in the United States District Court for the Northern District of Texas, Dallas Division, attacking Section 21 of the Dallas City Charter as being unconstitutional. The Charter was voted by the citizens of Dallas and is applicable only to the City of Dallas. It has no state-wide application. Being of a purely local nature, it is not a matter that was required to be heard by a three-judge court pursuant to 28 USC § 1252, nor is it a matter under which there would be a direct appeal to this Court under 28 USC § 1253. The questions presented did not require adjudication by a District Court composed of three judges in accordance with 28 USC § 2281, which applies only to State statutes by restraining the action of any officer of such State in enforcing said statute or the order of an administrative board or commission acting under State statutes.

QUESTIONS PRESENTED

In addition to the question of the jurisdiction of this Court to hear this matter on direct appeal, if heard, the Court is faced with the following question:

(1) Whether Section 21 of Chapter IV of the Dallas City Charter is unconstitutional and creates an invid-

ious discrimination against the right of the voters of the City of Dallas, contrary to the Equal Protection Clause of the Constitution of the United States.

STATUTES INVOLVED

The primary provision involved is Section 21 of Chapter IV of the Dallas City Charter. This involves the application of the Equal Protection Clause of the United States Constitution under the Fourteenth Amendment to this local Charter provision.

STATEMENT OF THE CASE

Max B. Goldblatt, the Appellant herein, was a candidate for the City Council of the City of Dallas from District C, Place 3, in the April 4, 1967, Election. The City Charter provides for the election of nine Councilmen, one of whom shall be the Mayor. Three of these Councilmen live at large and are elected at large. Six of the Councilmen must live in one of the six Districts into which the City is divided, but are elected at large. All of the Districts have a population that is approximately equal.

In the April 4th Election, the Appellant received 2,192 votes in District C, and his opponent received 1,287 votes. In the City-wide polling, the Appellant received 9,009 votes and his opponent received 14,429 votes. Therefore, his opponent was elected to the City Council.

Under the Charter any individual who is a resident and qualified voter of the City can run for the office of City

Councilman, either from the District, or at large. Similarly, under the Charter any group of citizens may organize and sponsor nine candidates or as many as they desire for membership in the governing body. Biannually there have been elections where various organizations from time to time sponsored candidates for places on the City Council. The Citizens Charter Association originally sponsored the council-manager form of government. Upon its adoption, the Association has sponsored candidates for the City Council, although it is not a permanent organization.

These were the facts that were before the Court and that are before this Court. All of the magazine articles and the writings of the newspaper reporters and the writers of books and fiction, certainly cannot form a basis of fact upon which this Court could actually act. These are matters completely outside the record and are completely unsubstantiated. If these are matters to be considered by the Court, then we request permission to file in this Court the many, many articles and news items that have praised the system used in the City of Dallas, but we do not feel that the time has yet arrived for law to be dictated by the newspaper correspondent, or justice to be meted out by fiction.

The record contains a stipulation of the Parties and the matters that were before the Court at the time the injunction was denied.

ARGUMENT

I.

JURISDICTION

28 USC § 2281 provides for a three-judge court when an injunction is sought against the enforcement of a State statute upon the ground that it is unconstitutional. No State statute is involved in this cause. The attack is made on Section 21 of Chapter IV of the Charter of the City of Dallas, which provides the framework of the city government of the City of Dallas and applies only within the city limits of Dallas, has only local application and was adopted by the electorate at an election held within the City.

Where a charter is of local application only and not of state-wide application, the case is not one for a three-judge court. *Dusch v. Davis*, 387 U.S. 112 (1967), *Moody v. Flowers*, 387 U.S. 97 (1967).

In the past where this Court could not hear the matter on its merits, it did preserve the Appellant's proper remedy if the question of jurisdiction "was not obviously settled by prior decisions." *Phillips v. United States*, 312 U.S. 246, 254 (1941). This matter was completely settled by the decisions of this Court prior to the institution of this action, therefore there could be no sound reason for this Court to enter any order in this cause. *Double Eagle Lubricants, Inc. v. Texas*, 248 F. Supp. 515 (1965); 384 U.S. 434 (Dism. Lack of Jurisdiction); 385 U.S. 890 (Reh. denied). The United States District Court for the Northern District of Texas, Dallas Division, was the proper forum for this case, and it

was a matter for the District Judge alone. The decision of the three-judge court stated that:

> "It is, therefore, the Opinion, Order, and Judgment of the Court and of each of the Judges that the Plaintiff's Motion for Summary Judgment be denied, * * *."

II.

UNSUBSTANTIAL QUESTION

The Appellant in this cause has raised no substantial question. He merely complains of the fact that the City Councilmen of the City of Dallas are elected at large, and that there is a group of interested citizens who have actively supported slates of candidates and these candidates have been elected. Active interest in the government has always been one of the mainstays of the democratic system. To now say that this is not only undesirable but that it creates an unhealthy climate and an invidious discrimination against those who do not take the same interest in their government, is reversing the processes of democracy.

This Court has formulated the Constitutional test under the Equal Protection Clause of the Constitution in cases involving the principle of one-man one-vote. This test has been whether or not there is an "invidious discrimination." *Reynolds v. Sims*, 377 U.S. 533 (1964); *Dusch v. Davis*, *supra*. As was stated in the recent case of *Avery v. Midland County, Texas*, (36 L.W. 4257, April 1, 1968):

> "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. * * *"

Applying the above test, this Court has held that a system identical to that of the City of Dallas meets the constitutional test. Where the City of Dallas has a six-three election plan with six residing in districts and elected at large, and three residing at large and elected at large, the City of Virginia Beach, in the case of *Dusch v. Davis, supra*, had a seven-four plan with seven living in districts and elected at large, and four living at large and elected at large. Their districts or boroughs varied from 733 in population to 29,048. In Dallas the districts are substantially the same. The opinion of Mr. Justice Douglas in this case quoted from Mr. Justice Brennan's opinion in *Fortson v. Dorsey*, 379 U.S. 433 (1965), in these words:

> "By anology the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is nonetheless the city's, not the borough's councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination. * * *" 387 U.S. at 115-16

Again, in the recent case of *Avery v. Midland County, Texas, supra*, this Court stated that:

> "* * * the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. * * *"

but has stated further:

> "* * * Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population."

This same type of system was approved again in the case of *Reynolds v. Sims, supra,* at page 579, in these words:

> "* * * Single-Member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."

It was also stated in the *Reynolds* case, *supra,* at page 566, that it is not the intent of the one-man one-vote rule to give to any particular minority, a majority control of the legislative body. There are other ways of protecting these minorities:

> "* * * Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future."

The Courts in years past have stated that the system employed by the City of Dallas is automatically a compliance

with the demands of the Constitution. In *Wesberry v. Sanders*, 376 U.S. 1, 7-8, (1964), the Court stated:

> "We hold that, construed in its historical context, the command of Art. I, §2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable *one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, * * * when Representatives are chosen as a group on a statewide basis,* as was a widespread practice in the first 50 years of our Nation's history." (Emphasis supplied)

In truth and in fact there is no system which guarantees more clearly to an individual that his vote shall be the equal of every other man's vote than the system that is employed by the City of Dallas. Each voter gets to vote on each and every Councilman. The size of the district and whether selection is to be by district or by general vote, is a matter that is to be determined by the local government so long as it does not disenfranchise or invidiously discriminate against any particular group. *Reed v. Mann*, 237 F. Supp. 22 (N.D. Ga. 1964). This same reasoning was upheld in the *Fortson v. Dorsey* case, *supra*, when the Court stated:

> "* * * The equal protection argument is focused solely upon the question whether county-wide voting in the seven multi-district counties results in denying the residents therein a vote 'approximately equal in weight to that of' voters resident in the single-member constituencies. Contrary to the District Court, we cannot say that it does. * * *" (379 U.S. at 436-437)

In fact, the Court stated that one who is elected at large is a representative of all of the people and not just the district wherein he resides:

> "* * * *It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides.* The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate *he must be vigilant to serve the interests of all the people in the county*, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. * * *" (Emphasis supplied) (379 U.S. at 438)

Since this Court has previously held that it is the intent of the Constitution of the United States that one man's vote shall be equal to another's, then the Charter of the City of Dallas may be pointed to as the document that most nearly grants this equality.

CONCLUSION

We respectfully submit that this Court does not have jurisdiction of the Appellant's direct appeal from the decision of the three-judge court and therefore should be dismissed for lack of jurisdiction. In the alternative, if this Court holds that the three-judge court would have jurisdiction of Appellant's complaint, it is respectfully submitted that Appellant presents no substantial question for a decision by this Court and that the Judgment and Decree of the court below

should be affirmed on the authority of the recently adjudicated cases decided by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for Appellee City of Dallas certifies that a copy of Appellee's Motion to Dismiss and in the Alternative to Affirm, has been served upon the Appellant by delivering a copy of said Motion to:

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